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No. 03-666

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IN THE
SUPREME COURT OF THE UNITED STATES

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,

Petitioner

v.

ZONING HEARING BOARD OF EASTTOWN TOWNSHIP, PENNSYLVANIA

Respondent

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF OF AMICUS CURIAE NEXTEL COMMUNICATIONS, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Amicus Nextel Communications, Inc. is publicly traded on NASDAQ. Together with its publicly traded affiliate, Nextel Partners, and their respective operating subsidiaries (all of which are hereinafter collectively referred to as "Nextel"), [1] Nextel is the fifth largest provider of wireless telephone services in the United States. As of September 2003, Nextel had over 12,000,000 customers and it continues to add customers at the rate of more than 150,000 per month. [2]

As of the end of 2002, Nextel's wireless network consisted of approximately 16,300 antenna sites nationwide, serving areas where nearly 250,000,000 of our Nation's citizens reside. Nextel has invested billions of dollars in this infrastructure.

In order to continue to enhance and maintain its wireless network, Nextel -- like the Petitioner and like every other provider of wireless telephone services -- routinely must seek authorization from local governments to construct antenna facilities. Primarily because of the visual impact of such facilities, providers often face difficulty in obtaining such

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[1] Pursuant to Supreme Court Rule 37.2 (a), Nextel states that the parties to this appeal have consented to the filing of this amicus brief. Pursuant to Supreme Court Rule 37.6, Nextel states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than Nextel made any monetary contribution to the preparation or submission of this brief.

[2] The statistics cited in this and the following paragraph are set forth in public filings made by Nextel with the United States Securities and Exchange Commission and other publicly-available disclosures.

permission. They thus require the protection of federal law, which is provided by Section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332 (c)(7)(B) (hereinafter the "TCA"). The TCA strikes a balance between the legitimate interests of local governments and the national policy which favors the deployment of wireless telephone services and other advanced telecommunications technologies. This balance has been upset by the Third Circuit's 2-to-1 decision in the case at bar, which has interpreted the "effective prohibition" clause in the TCA in a manner that is contrary to the interpretation of other circuit courts. If allowed to stand, the Third Circuit rule would allow local governments to regulate wireless telecommunications providers and to restrict their ability to provide service in a manner not intended by Congress. Nextel respectfully submits that certiorari review by this Honorable Court is needed to restore a proper balance and to create uniformity in this important area of federal law.

SUMMARY OF THE ARGUMENT

The TCA was enacted in 1996 to accelerate private sector deployment of advanced telecommunications technologies, including wireless services, in a deregulated and pro-competitive environment. Congress again sought to foster this aim in 1999 when it passed the Wireless Communications and Safety Act of 1999, noting the importance of ubiquitous and seamless wireless networks in providing immediate access to safety and emergency services.

In passing these laws, Congress sought to strike a deliberate compromise between two competing aims, namely, the preservation of local zoning powers to the extent necessary to protect legitimate local interests, on the one hand, and the ability of wireless providers to deploy the facilities needed to create ubiquitous and seamless networks, on the other. Central to the establishment of this balance is the "effective prohibition" clause of the TCA, which proscribes local regulations that have the effect of prohibiting either wireless services or the facilities necessary to provide them.

The five circuits which thus far have analyzed the "effective prohibition" clause have not adopted a uniform interpretation of the statute. This has impeded the ability of providers to obtain permission from local governments to deploy wireless facilities. To make matters worse, despite the clearly-expressed intent of Congress, the Third Circuit has adopted a rule which allows local governments to decide which carriers they will allow to provide service within their municipalities. This will result in what the First Circuit has described as a "crazy patchwork quilt" of network coverage, rather than the seamless networks which Congress envisioned and which wireless telephone users have the right to expect.

The case at bar presents this Honorable Court with an opportunity to adopt a uniform nationwide interpretation of an important federal statute in a manner that Congress intended.

ARGUMENT

I. In Order To Accelerate Deployment Of Wireless Networks The TCA Imposes Procedural And Substantive Limits Upon The Ability Of Local Governments To Regulate Wireless Telecommunication Facilities

As Petitioner correctly explains, Congress passed the TCA in order to accelerate private sector deployment of advanced telecommunication technologies and to make wireless telephone services available to all Americans. Petition for Certiorari at 2. The statute has been described as "'expansive legislation designed primarily to increase competition in the telecommunications industry," Sprint Spectrum L.P. v. Town of Easton, 982 F.Supp. 47, 49 (D.Mass. 1997) (quoting BellSouth Mobility, Inc. v. Gwinnett County, 944 F.Supp. 923, 927 (N.D. Ga. 1996), and "to take 'down the barriers'" faced by parties entering the telecommunications market, Town of Easton, 982 F.Supp. at 50 (quoting Cong. Rec. H1151 (Feb. 1, 1996) (statement of Rep. Markey)).

The national policy of accelerating deployment of wireless technologies was reiterated in the Wireless Communications and Safety Act of 1999,[3] which contains a finding that "the construction and operation of seamless, ubiquitous, and reliable wireless

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[3] The Wireless Communications and Safety Act of 1999 was intended to facilitate the deployment of enhanced-911 services, a new technology which merges Global Positioning Satellite technology with wireless telephone technology in order to allow emergency services to pinpoint the location from which an emergency call has been made.

telecommunications systems promote public safety and provide immediate and critical communications links among members of the public [and] [emergency service providers]." Wireless Communications and Safety Act of 1999, Pub. L. 106-81, 113 Stat. 1286, 1287 § 2(a)(6) (1999). See, also, 47 U.S.C. § 615.

To effectuate this national policy, "'the TCA significantly limits the ability of state and local authority to apply zoning regulations to wireless telecommunications.'" TeleCorp Realty, LLC v. Town of Edgartown, 81 F.Supp.2d 257, 259 (D.Mass. 2000) (quoting Town of Easton, 982 F. Supp. at 49). Local zoning powers are preserved, but only to the extent that they do not conflict with the rights granted to the telecommunications industry under the TCA. Town of Easton, 982 F. Supp. at 50. Although the TCA does not supplant local land use authority with respect to the construction of wireless telecommunications facilities, it does impose both procedural and substantive limits upon the power of local governments to regulate the placement and construction of such facilities. Town of Amherst v. Omnipoint Communications Enter., Inc., 173 F.3d 9, 12 (1st Cir. 1999). Where local government regulation exceeds any of the limits imposed by the TCA, wireless carriers are entitled to expedited relief in the district courts, 47 U.S.C. § 332 (c)(7)(B)(v), and "the state law that might ordinarily control such disputes is preempted." Brehmer v. Town of Wellfleet, 238 F.3d 117, 121 (1st Cir. 2001).

The First Circuit has described the TCA as "an exercise in cooperative federalism [which] represents a dramatic shift in the nature of telecommunications regulation." National Tower v. Plainville Zoning

Board of Appeals, 297 F.3d 14, 19 (1st Cir. 2002). Central to this "cooperative federalism" is an application of the TCA which strikes the proper balance between the national policy in favor of accelerated deployment and the legitimate interests that local governments have in regulating the aesthetic impact of wireless facilities.

II. Despite The "Effective Prohibition" Clause Local Regulation Continues To Impede Deployment Of Wireless Services

The Petition for Certiorari in this case presents an opportunity for this Honorable Court to ensure that the substantive limitation in the TCA which provides that local government regulation of wireless antenna facilities shall not "prohibit or have the effect of prohibiting the provision of personal wireless services," 47 U.S.C. § 332 (c)(7)(B)(i)(II),[4] is interpreted and applied in a manner consistent with Congressional intent. This provision has not yet prevented local land use authority from being yielded in a manner that is inconsistent with the Congressional purpose of encouraging the deployment of wireless networks.

Although it might be difficult in the abstract to determine what kinds of local policies might "have the effect of banning wireless services" or the facilities necessary to provide them, it cannot seriously be disputed that in the seven years since the TCA was

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[4] "Personal wireless services" as used in the TCA includes various types of telecommunications services including those services which are commonly referred to as cellular telephones. See 47 U.S.C. §§ 332 (c)(7)(C)(i), (d)(1).

enacted, wireless providers have faced significant difficulties in obtaining the local permission needed to deploy their facilities. Such difficulties are exemplified by various types of local government regulations described in numerous reported cases. For example, in Omnipoint Communications MB Operations, LLC v. Town of Lincoln, 107 F.Supp.2d 108 (D.Mass. 2000), the court examined a regulatory scheme which "restrict[ed] the location of [wireless facilities to six parcels of land scattered throughout the town], place[d] significant restrictions upon the manner in which [wireless facilities] may be constructed [and imposed] substantial filing requirements for obtaining a special permit" needed to construct any wireless facility. 107 F.Supp.2d at 111.[5] As another example, Nextel Communications of the Mid-Atlantic, Inc. v. Town of Wayland, 231 F.Supp.2d 396 (D.Mass. 2002), involved rejection of a proposal to mount an antenna facility on top of an existing 97-foot tall electric transmission tower which followed eight years of unsuccessful efforts by various wireless providers to bring their services to the town. And, in Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown, 2003 WL 21497159 (D.Mass. 2003), the municipal regulation, "[w]hile seemingly innocuous on its face" resulted in "only four parcels of land [in the town being permissible for wireless deployment] none

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[5] Despite the district court's holding in October 2000 that the Lincoln regulatory scheme violated federal law, Lincoln has not substantially altered that scheme and continues to be a defendant in at least two district court actions filed by carriers seeking to deploy wireless antenna facilities in the town. See Cellco Partnership v. Town of Lincoln, No. 01-CV-10739-MLW (D.Mass.); Nextel Communications v. Town of Lincoln, 01-CV-10740-NG (D. Mass).

[of which actually were] available. . . ." 2003 WL 21497159, at *10. Similar examples can be found in many other reported (and unreported) decisions.

Continued reports of "dead spots" throughout the Nation provide further evidence that local governments have not recognized their obligations to allow wireless carriers a reasonable opportunity to deploy the facilities needed. As but one example, earlier this year Congressman Anthony Weiner (D-NY) reported the results of a study which concluded that in New York City alone, more than 500 "dead spots" exist for the six major carriers licensed to serve that municipality. See Press Release of Rep. Anthony D. Weiner regarding Cell Phone 9-1-1 Study, available at http://www.house.gov/apps/list/press/ny09_weiner/0202126cell.html (January 26, 2003). In large part because of these gaps in coverage, "[e]ach year in [New York City] an estimated 120,000 calls placed to 9-1-1 on cell phones don't go through." Id. Nationwide, the estimate is an astonishing 2,200,000 unsuccessful emergency calls annually. Id.

To be sure, not all coverage gaps can be attributed to overly-restrictive local regulation of wireless facilities. The conclusion is nevertheless inescapable that local government regulation remains a substantial impediment to the fulfillment of the national policy, as articulated by Congress, of developing ubiquitous and seamless wireless networks.

III. There Is A Split Among The Circuits Regarding The Application Of The "Effective Prohibition" Clause In Cases Involving Denials Of Proposals To Build Wireless Facilities

In the seven years since the TCA became law, dozens of district courts decisions and several circuit court decisions have addressed the meaning of this "effective prohibition" clause. These cases have arisen in various settings, owing to the specifics of the local regulation at issue, the nature and location of the carrier's proposed facility, the availability of alternative siting locations and other factors. Unfortunately, the circuits have not been uniform in their interpretation of the clause, and this has only compounded the difficulties carriers face in seeking to convince often-skeptical local officials that a particular wireless facility should be allowed.

Cases involving moratoria or other outright bans of wireless facilities have not been difficult to decide. See, e.g., AT&T Wireless PCS Incorporated v. City Council of City of Virginia Beach, 155 F.3d 423, 428 (4th Cir. 1998) (citing four cases overturning local moratoria on zoning permits for wireless facilities). Inconsistent approaches among the circuits have arisen, however, where regulations which did not facially ban wireless facilities but which led to denial of specific proposals were alleged to be too restrictive.

Virginia Beach, 155 F.3d 423, was the earliest circuit court decision analyzing the "effective prohibition" clause. In that case, the Fourth Circuit held that the "effective prohibition" clause could not be violated by anything other than an outright ban

(although the court stated it dicta that it was prepared to recognize that "policies that do not explicitly ban . . . service but do, when applied . . ., guarantee the rejection of every application could . . . also violate [the TCA]") 155 F.3d at 429.[6]

Then, in Town of Amherst v. Omnipoint Communications Enter., 173 F.3d 9 (1st Cir. 1999), the First Circuit refused to "rule out the possibility that -- based on language or circumstances -- some individual decisions could be shown to reflect, or represent an effective prohibition on wireless services." Id. at 14. The court also made it plain that local governments bear at least some responsibility to create reasonable opportunities for deployment, holding that municipalities cannot "exhaust applicants by requiring successive applications without giving any clue of what will do the trick." Id. at 17. The court nevertheless held that in such cases the provider claiming an effective prohibition of wireless service must meet the "heavy" burden of demonstrating that (either on the face of the challenged regulation or under the circumstances surrounding its application by the municipality) "further reasonable efforts" to obtain

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[6] The Fourth Circuit has since made it clear that in the absence of an outright ban, a finding of a "guaranteed rejection" will almost never occur, noting that while it is at least "theoretical[ly] possible that the denial of an individual permit could amount to a prohibition of service if the service could only be provided from a particular site, . . . such [a] scenario 'seems unlikely in the real world.'" USCOC of Virginia RSA # 3 v. Montgomery County Board of Supervisors, 343 F.3d 262, 268 (4th Cir. 2001) (citation omitted).

land use approval "are so likely to be fruitless that it [would be] a waste of time even to try." Id. at 14.[7]

Approximately two months later, the Second Circuit adopted yet another formulation of the "effective prohibition" clause. Sprint Spectrum v. Willoth, 176 F.3d 630 (2nd Cir. 1999). While the Willoth court found that providers are not empowered by federal law to "construct any and all towers that, in [their] business judgment, [they deem] necessary to compete effectively with other telecommunications providers, wireless or not," id. at 639, the court did hold that "local governments must allow service providers to fill gaps" in their wireless networks, id. at 643. This requirement, however, was tempered by the holding that "[a] local government may reject an application for construction of a wireless service facility in an under-served area without [effectively] prohibiting personal wireless services if the service gap can be closed by less intrusive means." Id. (quoting Amherst, 173 F.3d at 14).

After Virginia Beach, Amherst and Willoth, the "effective prohibition" clause could be understood to impose upon local governments a duty to allow wireless providers at least some opportunity to close significant gaps in their networks, while at the same time requiring providers to demonstrate a very high level of diligence in ferreting out various alternative methods by which service might be provided in each

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[7] One of the "circumstances" that district courts may consider under the First Circuit rule is the extent to which a municipality has displayed a "fixed hostility" towards wireless facilities. See, e.g., Omnipoint Holdings v. Town of Westford, 206 F.Supp.2d 166, 172 (D.Mass. 2002).

such locality. The three tests nevertheless were substantially different, and none could be described as easy for a provider to satisfy.

After these three circuit court decisions, the Third Circuit issued a decision that shifted a tremendous amount of regulatory power to local governments by adopting the so-called "one provider" rule, which the court continues to follow and which thus forms the underpinning for the case that is the subject of the instant petition for certiorari. APT Pittsburgh Ltd v. Penn Township Butler Cty., 196 F.3d 469 (3rd Cir. 1999). In Penn Township, the Third Circuit agreed with the Second Circuit's requirement of a showing that the proposed facility "is the least intrusive means for closing a significant gap" in a wireless network. Id. at 480. The court, however, then added to that requirement a need for "evidence that the area [that] the [proposed] new facility will serve is not already served by another provider." Id.

Two weeks after Penn Township, the Third Circuit tipped the scale even more sharply in favor of municipalities. In Cellular Telephone Co. v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus, 197 F.3d 64 (3rd Cir. 1999), the court expressly approved the notion that, when deciding issues concerning the placement of wireless infrastructure, local governments can evaluate the "quality" of a wireless network in order to "weigh the benefits of enhancing it against the possible costs" as long as this analysis was "authorized by and performed within the parameters of governing state and local law." Id. at 70. The court also held that in some cases, a community could exclude wireless facilities altogether, based upon

a showing of an "adequate level of services [provided by] facilities solely outside that community." Id. at 71.

The Third Circuit's "one provider" rule, first articulated in Penn Township and reiterated in subsequent cases, has not garnered any support in the other circuits. In Second Generation Properties, L.P. v. Town of Pelham, 313 F.3d 620 (1st Cir. 2002), the First Circuit had an opportunity to review this rule and soundly rejected it. The court wrote as follows:

> A flat "any service equals no effective prohibition" rule would say a town could refuse permits to build the towers necessary to solve any number of different coverage problems. It is highly unlikely that Congress intended the many qualitatively different and complex problems to be lumped together and solved by a rule for all seasons that any coverage in a gap area automatically defeats an effective prohibition claim .... The result would be a crazy patchwork quilt of intermittent coverage .... [S]uch a consequence was not, we think, the [result which Congress intended].

313 F.3d at 633.

The last circuit to weigh in on the "effective prohibition" clause was the Seventh. Voicestream Minneapolis Incorporated v. St. Croix County, 342 F.3d 818 (7th Cir. 2003). The court in that case agreed with the First Circuit's imposition of a burden upon providers to show that they have "investigated thoroughly the possibility of other viable alternatives." Id. at 834-35. The court's opinion also includes a lengthy footnote which criticizes the requirement of a showing of "least intrusive means" as "expounded by the Second and Third Circuits," id. at 835 n.8, but the court did not comment on the Third Circuit's "one provider rule."

The state of the law in the circuits which have addressed the effective prohibition clause can be summarized as follows. In the First and Seventh Circuits, a provider must show that it has a significant gap in coverage and that either that the only feasible alternative for closing that gap has been rejected, or that criteria are being applied which are impossible to meet. Second Generation Properties, 313 F.3d at 620; Voicestream Minneapolis Incorporated, 342 F.2d at 818. The test in the Fourth Circuit appears to be similar, although that court has stated on two occasions that it is skeptical that the absence of alternatives can ever be proven. See USCOC of Virginia RSA #3, 343 F.3d at 268. In the Second Circuit, a provider must show that the "least intrusive means" for closing a significant gap in coverage has been rejected. Finally, in the Third Circuit, a provider must show not only that "the least intrusive means" for closing a significant gap has been rejected but also that there are presently no other

wireless carriers providing service within that gap. Omnipoint Comm. Enter. v. Zoning Hearing Board of Easttown Township, 331 F.3d 386, 398-99 (3rd Cir. 2003).

IV. The Third Circuit's Approach Impermissibly Tips The Balance Established By The "Effective Prohibition" Clause In Favor Of The Municipalities

In the case at bar, the Third Circuit had an opportunity to revisit its earlier holding in light of Second Generation Properties. In a two-to-one decision, the panel decided to continue its adherence to the so-called one-provider rule, notwithstanding the dissent of Judge Rosenn, who believed that the First Circuit rule, as enunciated in the Second Generation Properties case, should be followed.

The split among the Circuits, described above, raises a question of federal law which is of significant importance to the wireless telecommunications industry. Despite investments of billions of dollars in wireless infrastructure, the industry continues to be unable to keep pace with the ever growing demand for such services, in large part because municipalities continue to exercise strict control over the siting of wireless facilities. See Weiner Press Release, supra; see also Letter from Sen. Charles E. Schumer to Michael K. Powell, Chairman of the Federal Communications Commission, available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01332.html (November 24, 2002). Accordingly, the question is now squarely presented for this Honorable Court: does the so-called one-provider rule improperly limit competition among

wireless providers by tipping the balance of the competing interests too sharply in favor of local governments?

Nextel respectfully submits that the one-provider rule does, indeed, go much too far in protecting the legitimate interests of municipalities. Indeed, the rule plainly allows municipalities to pick and choose among the wireless carriers that might serve a given geographical area, thereby elevating local interests to the point where municipalities are given the power to veto the decision of a provider to service that particular market. The TCA was not intended to grant such broad regulatory power to municipalities.

There is, moreover, no other justification for the Third Circuit's test. As Judge Rosenn explained in his dissent, "the majority approach . . . threatens Congress' goal of promoting rapid acceleration of private sector deployment of advanced telecommunication and information technologies to all Americans." Omnipoint Comm. Enter., 331 F.3d at 405.

Nor can the pro-competitive goals of the TCA be met under the Third Circuit's "one provider" rule merely because carriers can still argue that they were subjected to "unreasonable discrimination" in violation of another section of the TCA, 47 U.S.C. § 332 (c)(7)(B)(i)(I). See Penn Township Butler Cty., 196 F.3d at 408 n.8. As Petitioner explains, it is far too easy for a municipality to articulate some minor factor or other which differentiates one provider's proposed facility from a competitor's existing facility. Petition for Certiorari at 23-24. In short, under the one-provider rule, a provider who seeks to enter a market already

served by a competitor finds itself completely at the mercy of local officials. This is not what Congress intended, and it is not what the statute says.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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